Editor's note: Appealed -- dismissed, Civ.No. C84-0220 (D.Wyo. July 16, 1985)

DAVIS OIL CO.

IBLA 84-27 Decided February 29, 1984

Appeal from decision of Wyoming State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease W-75024.

Affirmed.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Termination

   To justify failure to pay annual rental of an oil and gas lease so as to entitle appellant to reinstatement of lease pursuant to 30 U.S.C. § 188(c) (1976), the failure to make timely payment must be caused by factors beyond the control of the lessee. Where the record establishes that the lessee failed to send the rental payment in a timely fashion for unexplained reasons, and then failed to discover the missed payment until nearly 1 year later, there is no justification for the failure to make timely payment which will permit reinstatement.

2. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Termination

   A lease terminated by operation of law for failure to make timely payment can be reinstated upon proof of reasonable diligence in attempting to make payment or a showing that failure to make timely payment was justifiable, or, under certain circumstances, in the case of inadvertent failure to pay. Where appellant did not offer to pay annual rental due on Sept. 1, 1982, until Aug. 24, 1983, and offered no proof of circumstances to justify nonpayment on the due date, the record fails to support the reinstatement of an oil and gas lease pursuant to any provision of 30 U.S.C. § 188 (1976) as amended.

3. Oil and Gas Leases: Reinstatement -- Federal Employees and Officers: Authority to Bind Government

   Neither the doctrine of equitable estoppel nor substantial fairness is available to offer appellant relief

> where reliance upon those doctrines is predicated upon circumstances which indicate appellant merely failed to make timely payment through its own neglect. The existence of a cover letter indicating a payment was sent where it subsequently appears there was no payment attached to the letter as shown, is insufficient alone to place the burden upon the Government to either establish it did not receive payment, or alternatively, to explain why it did not notify appellant of the apparent omission of payment from its letter.

APPEARANCES: Davis O. O'Connor, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Davis Oil Company (Davis) appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), denying a petition for reinstatement of oil and gas lease W-75024. On August 31, 1983, BLM declared lease W-75024 to have terminated by operation of law for nonpayment of rent. Lease rental for 1982 was due on September 1, 1982. The rental was not, however, offered to be paid until August 24, 1983, when payment in the amount of $2,784 for the 1982 and 1983 rentals was submitted to BLM together with a petition for reinstatement and a $25 filing fee. Petition for reinstatement is made pursuant to section 401 of the Federal Oil and Gas Management Royalty Act of 1982, 96 Stat. 2462, 30 U.S.C.A. § 188(d)(1) (West Supp. 1983) (section 401, Act), and also under provision of the prior existing statute, 30 U.S.C. § 188(c) (1976) (section 188(c)).

Davis contends, first, that it is entitled to reinstatement of lease W-75024 under section 401 of the Act because it was unaware that it had failed to make payment of the 1982 rental until late in 1983. According to Davis, a check in the correct amount was prepared in 1982 prior to the rental due date. A cover letter dated August 3, 1982, to accompany checks for payment of rental for several leases including lease W-75024 was prepared and sent, also prior to September 1, 1982. Davis infers the cover letter was received by BLM, apparently because the other lease payments offered at the same time were credited against the proper accounts. Only lease W-75024 remained unpaid, alone of the group of leases for which payment was planned to be transmitted by the cover letter dated August 3, 1982. See Appellant's Brief at 2, 3.

Davis, therefore, is unable to account for the check which was drawn to pay for lease W-75024. It argues from this circumstance that (1) the check was not sent or (2) it was sent, but was mishandled by BLM. From these logically deduced conclusions, Davis argues that reinstatement should be permitted, either under section 401, because the failure to accomplish timely payment was inadvertent, or else under section 188(c), because the failure was justifiable.

[1] Appellant correctly contends that section 401 of the Act has relaxed certain standards governing the reinstatement of Federal oil and gas leases in cases where a lease is automatically terminated by operation of law

for failure to pay timely rental. The Act provides for reinstatement of leases where the failure to pay was "inadvertent." Prior requirements that rental be tendered within 20 days of the due date and that failure to make payment be justified are not required to be complied with in the case of inadvertent failure to pay.

There are, however, time limitations upon the applicability of the provisions of section 401 in cases of failure to pay which arose prior to the effective date of the Act. The Act became law on January 12, 1983. Here, the failure to pay occurred earlier, on September 1, 1982. Under the circumstances, therefore, section 401(d)(2) applies, which provides, pertinently: "(2) No lease shall be reinstated [in case of inadvertent failure to pay] unless -- (A) with respect to any lease that terminated [by operation of law] prior to January 12, 1983; (i) the lessee tendered rental prior to January 12, 1983 * * *." 30 U.S.C.A. § 188(d)(2). Despite the apparently unambiguous language of the statute, Davis contends that this Board should seek clarification of the statutory language from the legislative history, based upon dicta appearing in the opinion in Conway v. Watt, 717 F.2d 512 (10th Cir. 1983). Conway declares invalid the application of provisions of 43 CFR 3112.2-1(c) (1980) 1/ requiring a date to be placed on a lease offer made on a simultaneous oil and gas lease drawing entry card in the Department's oil and gas lottery. The Conway court held that disqualification of the successful drawee under the regulation was arbitrary agency conduct. It is correct, as Davis contends, that the Conway decision does contain dicta concerning the provisions of section 401. At 717 F.2d 514 the Conway decision refers to section 401, by way of analogy, as support for the stated proposition that Congress did not intend trivial or inadvertent errors to disqualify applications by first drawn entrants under the simultaneous leasing system.

Faced, however, with the clear language of section 401(d)(2) which requires Davis to have made its offer of payment prior to January 12, 1983, the dicta in Conway lacks the force it might otherwise have. In this case it is unnecessary and illogical to look beyond the statute for clarification of a provision which is a clear statement creating a time limitation upon the application of the Act. The proper use of extrinsic aids such as the legislative history of the Act in statutory construction is to resolve ambiguity rather than to create it. FTC v. Manager, Retail Credit Co., 515 F.2d 988, 995 (D.C. Cir. 1975). While the effect of the Act is clearly to relax certain prior requirements for reinstatement of oil and gas leases, those liberalized rules do not fully apply to leaseholders whose leases terminated before January 12, 1983. Because lease W-75024 terminated prior to January 12, 1983, in order to take advantage of the provisions of section 401 Davis was required to tender payment of rental prior to January 12, 1983. The provisions of section 401 permitting reinstatement of a lease where nonpayment was inadvertant do not, therefore, apply to lease W-75024. 2/

1/ Amended effective Aug. 22, 1983, at 48 FR 33673 (July 22, 1983). 2/ Davis also argues that it should not have been required to submit payment of back rentals at an increased rate under section 401(e)(2), despite a contrary finding by BLM. Because the Board decides the provisions of section 401 do not apply to appellant's petition for reinstatement of lease W-75024, this issue is not reached.

[2] Appellant also contends lease W-75024 is entitled to reinstatement under the provisions of the prior law, section 188(c). In support of this contention, Davis argues that the late rental payment was justified by the circumstances of the cancellation of this lease since, first, Davis received no notice that there had been no lease payment made when due, and second, because the cover letter sent by Davis on August 3, 1982, with other payments for other leases, referred to payment for lease W-75024. These two circumstances, according to Davis, entitled the leaseholder to notice of the fact of nonpayment. Clearly, the only written notice sent by BLM of the termination of lease W-75024 was the BLM decision dated August 31, 1983, which rejected Davis' offered payment and petition for reinstatement.

Davis speculates that it may have sent timely payment for lease W-75024 but that BLM may have lost or mishandled the payment so that it was never credited to the proper account. This explanation of Davis' justification for nonpayment, however, puts the burden upon BLM to establish that Davis failed to make payment and then requires BLM to show that the nonpayment was not justified within the meaning of Departmental regulations permitting reinstatement. The rule is, however, just the reverse. The provision of the regulation governing reinstatement states, 43 CFR 3108.2-1(c)(2) (1982), that:

> The burden of showing that the failure to pay on or before the anniversary date was justifiable or not due to lack of reasonable diligence will be on the lessee. Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment. [3/]

This Board has uniformly applied the quoted regulatory requirement to cases such as this to prohibit reinstatement where there has been a late offer of payment without a showing of circumstances affecting the payment which are beyond the control of the lessee. The Department's position concerning this

---

3/ The statutory provision which this regulation implements, 30 U.S.C. § 188(c) (1976), provides, in pertinent part:

"Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease."

It is noted that the last sentence of 43 CFR 3108.2-1(c)(2) (1982) was omitted in the latest revision of the regulation. 48 FR 33674 (July 22, 1983). The new regulation allows reinstatement under 30 U.S.C. § 188(c) where the late rental payment was received within 20 days of the anniversary date and postmarked on or before the anniversary date. This more liberal standard of reasonable diligence does not help appellant, however, since payment was not tendered within 20 days.

aspect of the application of the law, prior to amendment by section 401, is described with approval by another Tenth Circuit opinion as follows:

> The transcripts of BLM and IBLA decisions reveal that the Secretary of the Interior reads § 188(c)'s "justifiable" standard to exonerate only late payments proximately "caused by factors outside the lessee's control," and that the Secretary normally will not consider an argument under § 188(c)'s "reasonable diligence" standard unless the rental payment was mailed "sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail." 3/ Record, vol. 1, at 15. Thus, the Secretary's interpretation of "reasonable diligence" and "justifiable" is broad enough to reinstate leases where the government received payments late due only to illness, Billy Wright, 29 IBLA 81 (1977); to injury to a key employee, David Kirkland, 19 IBLA 305 (1975); to severe winter weather, Genevieve C. Aabye, 33 IBLA 285 (1978); or to natural disasters, such as floods or earthquakes, Fuel Resources Development Co., 43 IBLA 19, 21-22 (1979). In contrast, the Secretary has consistently declined to reinstate leases where late payments resulted from errors of the lessee or his employees. See Fuel Resources Development Co., 43 IBLA 19, 21 (1979); Phillips Petroleum, 29 IBLA 114 (1977). Consistent with these cases, the IBLA found here that, not being a factor outside the lessee's control, "the inadvertence or negligence of a lessee's employee does not justify reinstatement of a lease terminated for failure to make a timely rental payment." Id. at 16.
>
> ---
>
> 3/ "In support of the second part of the Secretary's position, the IBLA decisions cite 43 C.F.R. § 3108.2-1(c)(2), which provides that "[r]easonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment." (Emphasis added). While plaintiffs in their brief make much of the liberality implied by "normally," it is apparent that the Secretary reads "normally" to suggest no more than that "factors outside lessee's control" which proximately cause any late payment -- but not factors within lessee's control, such as negligent or deceptive employees -- may permit a finding of "reasonable diligence."

Ramoco Inc. v. Andrus, 649 F.2d 814, 815-16 (10th Cir. 1981). Adherence to past Board decisions, therefore, requires rejection of Davis' argument that the failure to pay should be treated as justified, since there is no circumstance shown or suggested to indicate that failure to pay was caused by any occurrence beyond Davis' control.

[3] The arguments advanced by Davis also look beyond prior applications of section 188(c), however, and, again citing dicta from Conway v. Watt, supra, seek to find that the application of principles of substantial fairness,

similar in approach to reasoning appearing in Richard L. Rosenthal, 45 IBLA 146 (1980), requires reinstatement in this case.

In Rosenthal, a divided panel permitted reinstatement of a terminated lease where it found the negligence of a BLM employee had intervened to cause a payment to be received late. In Rosenthal, a proper payment had been mailed to a BLM office other than the office which administered the lease. The offered payment clearly indicated the location and address of the proper office to which payment should have been sent. Despite this fact, the payment was not forwarded to the correct office until 2 weeks after its receipt by BLM. The Board found BLM's failure to make a timely forwarding to be negligent conduct which was an intervening cause of late payment, and allowed reinstatement.

In Davis' case, however, there is no showing that BLM was in any way negligent in handling the Davis payment. A factual basis for invoking the rule in Rosenthal is simply missing from this case.

Davis also argues that the doctrine of equitable estoppel should be applied to require reinstatement of lease W-75024. Citing Armstrong v. United States, 516 F. Supp. 1252 (D. Colo. 1981), Davis reasons that the cover letter sent on August 3, 1982, which referred to a payment for lease W-75024, obliged BLM to give notice to Davis that the referenced payment for lease rental was not enclosed with the letter. This contention overlooks, however, that termination of the oil and gas lease in this case occurred by operation of law when there was nonpayment. See 30 U.S.C. § 188(b) (1976). There is no legal obligation upon the Department to give notice of the fact of such termination, which was the normal consequence of nonpayment, within the existing statutory and regulatory scheme. Tesoro Petroleum Corp., 65 IBLA 99 (1982); C. J. Iverson, 21 IBLA 312 (1975). Since, in the usage of oil and gas leasing, forfeiture is not disfavored as it is elsewhere in the law, there was no requirement for notice except as otherwise provided by regulation. See Kernco Drilling Co., 71 IBLA 53, 58 (1983). 4/

In Armstrong v. United States, supra at 1254, 1255, the court generally reviewed the Federal decisions governing application of the doctrine of estoppel against the Government. It appeared that there had been numerous Government denials, later retracted, that Armstrong was a member of the armed services when he received an injury for which he sought to claim compensation. As a result, Armstrong was permitted to present a claim dating from the time of his discharge, a remedy that would not, under the circumstances of his claim in the absence of estoppel, otherwise have been available to him. The court reasoned that, because Government officials had earlier mislead

4/ Under the provisions of section 401(d)(2)(B) notice may be given to lessees whose leases are terminated by operation of law subsequent to Jan. 12, 1983. While appellant complains that this provision of the Act is unfair because it excludes Davis, whose lease terminated before Jan. 12, 1983, from the provisions of the law, it does not appear that the rule has not been uniformly applied. It is quite clear that appellant was not entitled to notice of cancellation of lease W-75024 under the provisions of section 401 in this case.

plaintiff concerning his duty status, and thereby delayed his claim, they should be estopped to deny his application for retroactive benefits. In Armstrong, the court found the five elements of estoppel described in United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978), to be facially present on the facts as found. 5/

Here, however, unlike the situation as described in Armstrong, there is no factual basis for a finding of affirmative misrepresentation or concealment of material fact by authorized agents of the United States. Such a finding is required to support an estoppel. The record reveals no representation or action by BLM of any sort calculated to induce Davis not to pay the lease rental when due. No notice was sent to Davis of the termination by operation of law of lease W-75024 because notices of such termination were not sent or required to be sent under existing Department rules in cases where there had been no tender of payment. There is no showing that BLM was aware Davis unintentionally had missed making its payment. The mere existence of an ambiguous reference to a nonexistent payment in Davis' cover letter dated August 3, 1982, does not show that BLM employees noticed the omission. If they had, they were under no duty to report it to Davis. Therefore, no affirmative action by BLM prevented payment in this case, nor can it properly be presumed that BLM had knowledge, which it concealed, that the failure to pay the rental for lease W-75024 was inadvertent. Despite Davis' intricate reasoning, the disposition of the missing payment is simply unexplained. A less compelling case for a finding of equitable estoppel can hardly be imagined.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

C. Randall Grant, Jr.
Administrative Judge

Gail M. Frazier
Administrative Judge

5/ The opinion summarizes the five elements at page 1255 of Armstrong v. United States:

"1) The party to be estopped must know the facts;

2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

3) The latter must be ignorant of the true facts; and

4) He must rely on the former's conduct to his injury. . . .

"[t]he elements must [also] be read as requiring an affirmative misrepresentation or affirmative concealment of a material fact by the government."